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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 40159
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR 2011-17463
v.)	
)	
CHRISTOPHER LEE LAY,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

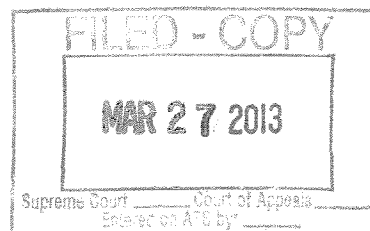
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STATEMENT OF THE CASE

Nature of the Case

In this consolidated appeal, Christopher Lee Lay appeals from judgments of conviction for attempted strangulation, domestic battery in the presence of children, and intimidating a witness, and persistent violator enhancements as to both felony convictions, following a jury trial. On appeal, Mr. Lay asserts that his due process right to notice of the charge against him was violated when the intimidating a witness conviction was enhanced by a persistent violator finding because no documents were ever filed notifying him that the State sought an enhancement as to that charge, and the jury's verdict did not include a finding that he was a persistent violator as to the intimidating a witness conviction. He further asserts that the district court abused its discretion when it declined to place him on probation following his convictions for attempted strangulation and intimidating a witness.¹

Statement of the Facts and Course of Proceedings

This is a consolidated appeal from two cases in which Mr. Lay was charged in one with attempted strangulation and domestic battery in the presence of children, along with a persistent violator enhancement, and in the other, with intimidating a witness. (R., pp.37-38, 45-46, 239-40.) Following a jury trial on the criminal charges, Mr. Lay was found guilty of attempted strangulation, misdemeanor domestic battery, and intimidating a witness. (Tr., p.349, L.10 – p.350, L.13.) After a jury trial on the

¹ Mr. Lay has already served the sentence imposed for the misdemeanor domestic battery conviction, thus rendering moot any claim that his sentence for that conviction was excessive. As such, he does not pursue such a claim on appeal.

persistent violator enhancement, Mr. Lay was found to be a persistent violator “as charged in Part II of the Information.”² (Tr., p.368, L.11 – p.369, L.5; R., p.190.)

At the sentencing hearing, the State requested imposition of a unified sentence of twenty years, with ten years fixed, for attempted strangulation, and a consecutive indeterminate sentence of five years for intimidating a witness. Defense counsel requested a unified sentence of five years, with one year fixed, for attempted strangulation, and an indeterminate sentence of three years for intimidating a witness, and requested that both sentences be suspended in favor of probation. (Tr., p.393, Ls.6-10.) Ultimately, the district court imposed a unified sentence of fifteen years, with five years fixed, for attempted strangulation, and a consecutive, indeterminate sentence of five years for intimidating a witness. The district court declined to place Mr. Lay on probation or to retain jurisdiction. (Tr., p.398, L.15 – p.400, L.10.) The judgments of conviction indicate that Mr. Lay’s sentence on each felony charge “was enhanced by the persistent violator charge contained in the Information Part II.” (R., pp.204, 389.)

Mr. Lay filed Notices of Appeal timely from the judgments of conviction. (R., pp.211, 394.)

² The only Information Part II contained in the record concerns the attempted strangulation case. (R., pp.45-46.)

ISSUES

1. Was Mr. Lay's due process right to notice violated when he was found to be a persistent violator with respect to the intimidating a witness conviction when the State provided no notice of its intent to seek such an enhancement and the jury's verdict did not include a finding that he was a persistent violator as to the intimidating a witness conviction?
2. Did the district court abuse its discretion when it declined to place Mr. Lay on probation following his convictions for attempted strangulation and intimidating a witness?

ARGUMENT

I.

Mr. Lay's Due Process Right To Notice Was Violated When He Was Found To Be A Persistent Violator With Respect To The Intimidating A Witness Conviction When The State Provided No Notice Of Its Intent To Seek Such An Enhancement And The Jury's Verdict Did Not Contain A Finding That He Was A Persistent Violator As To The Intimidating A Witness Conviction

At the time of sentencing, the parties and the district court erroneously believed that Mr. Lay had been found to be a persistent violator as to the intimidating a witness conviction. However, neither an Information Part II nor any Amended Information was ever filed in that case. (R., pp.239-323.) Therefore, the jury's finding that he was a persistent violator "as charged in Part II of the Information" (Tr., p.368, Ls.15-23; R., p.190), can only have been said to have represented a finding as to the attempted strangulation conviction. (R., pp.45-46 (Information Part II filed in District Court Case No. CR-FE-2011-0017463).)

Furthermore, the Information Part II in the attempted strangulation case was filed more than two weeks before the Information charging Mr. Lay with intimidating a witness was filed. (R., pp.45-46, 239-40.) As such, the finding that Mr. Lay was a persistent violator with respect to the intimidating a witness charge, as noted at sentencing (Tr., p.377, Ls.3-14), and set forth in the judgment of conviction (R., pp.388-89), violated Mr. Lay's due process right to notice that the State was seeking such an enhancement with respect to the intimidating a witness charge. *See State v. Campbell*, 114 Idaho 367, 373-74 (Ct. App. 1988) (holding that Idaho Code § 19-2514 does not require notice prior to any preliminary hearing, as it "requires notice only through an allegation in the Information filed in district court"); *State v. Haggard*, 146 Idaho 37, 39-40 (Ct. App. 2008) ("In order for a person to be sentenced as a persistent violator, the

prior convictions relied upon to invoke I.C. § 19-2514 must be alleged in the indictment or information and proved at trial.”) (citation omitted). It is clear that Mr. Lay’s due process right to notice of the State’s intent to seek a persistent violator enhancement as to the intimidating a witness charge was violated, and that the jury’s verdict did not contain a finding that he was a persistent violator as to the intimidating witness conviction.

While the sentence imposed did not exceed the non-enhanced maximum sentence for intimidating a witness,³ it is impossible to say from the record that the erroneous persistent violator finding was harmless. As the Idaho Court of Appeals explained in *State v. Clark*, 132 Idaho 337 (Ct. App. 1998),

The persistent violator status carries with it a certain stigma and may place pressure on the sentencing court to protect the public with a more lengthy sentence, as well as on prison officials who may be reluctant to grant parole. Therefore, a persistent violator finding will often cause enhancement of the sentence imposed by the sentencing court and may also defer one’s parole status.

Clark, 132 Idaho at 340. The Court of Appeals went on to explain that, in light of the fact “that the record is silent as to how the persistent violator finding was taken into account by the district court in constructing the sentence” and its concerns about stigma and pressure, it could not find the error to be harmless beyond a reasonable doubt. *Id.* at 340-41. As in *Clark*, in Mr. Lay’s case the record is silent as to how the district court applied the erroneous persistent violator enhancement in constructing his sentence for intimidating a witness.

³ Because no sentence is provided for in Idaho Code § 18-2604 (intimidating a witness), the maximum sentence is five years in prison. I.C. § 18-112 (providing that the maximum sentence for a felony when no other penalty is prescribed by statute is five years).

As such, Mr. Lay's sentence for intimidating a witness must be vacated, with this matter remanded for resentencing without relying on the erroneous persistent violator finding. In the alternative, if this Court finds any sentencing error to be harmless beyond a reasonable doubt, he respectfully requests that this Court remand this matter for entry of a corrected judgment of conviction deleting the erroneous persistent violator finding with respect to the intimidating a witness conviction, so that the parole board does not prevent Mr. Lay from being placed on parole due to the stigma associated with the finding.

II.

The District Court Abused Its Discretion When It Declined To Place Mr. Lay On Probation Following His Convictions For Attempted Strangulation And Intimidating A Witness

Mr. Lay asserts that, given the mitigating factors present in his case, most notably the express wishes of the victim, the district court abused its discretion when it declined to place him on probation following his convictions for attempted strangulation and intimidating a witness.

Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. See *State v. Reinke*, 103 Idaho 771 (Ct. App. 1982). The Idaho Supreme Court has held that, "[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence." *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Lay does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion,

Mr. Lay must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

The most important mitigating factor in Mr. Lay's case is the fact that the victim asked the district court not to sentence him to any term of incarceration. Specifically, she pleaded with the district court to "let him out of his sentence and dismiss the no contact order." (Tr., p.389, L.25 – p.390, L.6.) The people of Idaho thought that the opinions and feelings of crime victims were so important that they granted them special rights via an amendment to the Idaho Constitution. ID. CONST. ART. I, SEC. 22. Among those rights are the right "[t]o be treated with fairness, respect, dignity, and privacy" and the right "[t]o be heard, upon request, at all criminal justice proceedings considering a plea of guilty, sentencing, incarceration or release of the defendant." *Id.* The express language of the amendment requires consideration of a victim's wishes prior to imposing sentence, and that the victim be treated with respect by the courts. The failure of the district court to give adequate consideration and respect to the express wishes of the victim as to the appropriate sentence for Mr. Lay, namely one not involving incarceration, was an abuse of discretion.

In addition to the victim's express wishes that Mr. Lay not serve a term of incarceration, several other mitigating factors justify placing Mr. Lay on probation. First, Mr. Lay acknowledged being addicted to drugs. (Tr., p.394, Ls.1-2.) Along these lines, he explained, "I wish drugs and alcohol was [sic] never a part of my life." (PSI File, p.6.) Second, he demonstrated maturity and accepted responsibility for his past performance

on probation and parole when he acknowledged that his previous “attempts . . . were not even close to satisfactory.” (Tr., p.394, Ls.3-4.) Further support for his change in perspective can be seen from the fact that, unlike during past incarcerations, he had no disciplinary problems while incarcerated on the charges for which he was convicted in this case, “indicating he has not presented a behavioral management problem.” (PSI File, pp.10-11.)

Additionally, Mr. Lay showed great insight when he requested that, as a condition of the probation he requested, he not be allowed to be in a romantic relationship for at least three years because “I don’t really know what constitutes a healthy relationship.” (Tr., p.394, L.21 – p.395, L.3.) Mr. Lay is amenable to treatment, having explained, “I think that relationship classes, parenting classes, stuff in that nature, domestic violence classes would be great. And I’m all for it, Your Honor.” (Tr., p.395, Ls.3-6.) Another mitigating factor is that Mr. Lay had a chaotic childhood, during which time his mother “struggled with drug addiction,” resulting “in him spending his teenage years in foster and group homes.” One of his stepfathers was physically abusive, including “burn[ing] us with lighters, break[ing] 2x4’s over our butts” and “smash[ing] mine & my older brother’s heads together so hard I would see stars and have big knots on my head.” (PSI File, p.12.) Finally, Mr. Lay enjoys the support of his family and friends, as evidenced by a number of letters of support provided to the district court prior to sentencing. (PSI File, pp.65-70.)

In light of the mitigating factors present in his case, most notably the express wishes of the victim that he not be given a sentence of incarceration, the district court abused its discretion when it declined to place Mr. Lay on probation following his convictions for attempted strangulation and intimidating a witness.

CONCLUSION

For the reasons set forth herein, Mr. Lay respectfully requests that this Court vacate the sentence imposed for intimidating a witness, enhanced based on an erroneous persistent violator finding, and remand this matter to the district court for resentencing without applying a persistent violator enhancement. Additionally, Mr. Lay respectfully requests that this Court remand this matter with an order that his sentences for attempted strangulation and intimidating a witness be suspended, and that he be placed on probation for a period of ten years, with appropriate terms and conditions to be determined by the district court on remand.

DATED this 27th day of March, 2013.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING


I HEREBY CERTIFY that on this 27th day of March, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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INMATE #57761
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ADA COUNTY DISTRICT COURT
EMAILED BRIEF

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SJH/ns